IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2006

STATE OF TENNESSEE v. CURTIS LEE THAMES

Direct Appeal from the Circuit Court for Sevier County
No. 9648-II Richard R. Vance, Judge

No. E2005-00895-CCA-R3-CD Filed April 7, 2006

The defendant, Curtis Lee Thames, pled guilty to aggravated robbery, a Class B felony, in return for an eight-year sentence served in a manner to be determined by the trial court. The trial court ordered the defendant to serve his sentence in confinement, and the defendant appealed. Following our review of the record and the parties' briefs, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ. joined.

Amber D. Haas, Sevierville, Tennessee, for the appellant, Curtis Lee Thames.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Al Schmutzer, District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant was indicted for and pled guilty to aggravated robbery. The trial court accepted the defendant's plea and set a sentencing hearing to determine the manner of service of the sentence. At the sentencing hearing, the state presented the facts of the case as follows:

> [T]his Defendant, along with two co-defendants, entered The Paper Factory armed with guns, ordered the employees - - two employees back into a back room, the other one to open up the cash register. About [$]2,300 was stolen. And they took off.
>
> The other two co-defendants were arrested the next day and - - and confessed, told about their involvement, along with the involvement of this Defendant. Another

> witness, the girl that had driven them there, also gave a statement indicating that this Defendant was involved. This Defendant did flee to another state and was not under arrest - - or not served with this warrant here in Sevier County until February 16th, 2003.

Also at the sentencing hearing, the defendant's sister, Betty Ann Thames Lane, testified on the defendant's behalf. Mrs. Lane explained that the defendant had "always been quiet . . . [and] never been any trouble or harm[ed] anyone." Mrs. Lane felt that the defendant was running with the wrong crowd and that peer pressure had affected his state of mind. Mrs. Lane pled with the court to give the defendant a second chance. On cross-examination, Mrs. Lane acknowledged that the defendant had a drug problem, a problem the defendant failed to admit to his probation officer. Also on cross-examination, Mrs. Lane admitted that she knew the defendant was recently convicted of possession of marijuana, but maintained that she did not know the incident happened while he was out on bond in the present case. The court questioned Mrs. Lane about the defendant's work history, which she testified that contrary to the pre-sentence report, the defendant had worked at a Burger King for almost a year and at a Budweiser warehouse for seven months.

The trial court took into account the defendant's pre-sentence report in sentencing. The report revealed that the defendant had prior convictions for a traffic offense, simple possession, and driving with a suspended license. The report further revealed that the defendant had never been employed and that it was unlikely he had supported his child in the past.

After hearing the testimony and reviewing the pre-sentence report, the trial court ordered the defendant serve his eight-year sentence in confinement. The defendant appealed.

ANALYSIS

In this appeal, the defendant challenges his sentence of confinement. Specifically, he argues that the trial court failed to properly weigh the mitigating factors presented at the sentencing hearing, which resulted in the denial of an alternative sentence or a sentence of split confinement. This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

In conducting our de novo review of a sentence, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of

sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

Generally, considerations relevant to determining a defendant's eligibility for alternative sentencing are relevant to determining suitability for probation. *See Ashby*, 823 S.W.2d at 169. A defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). If, however, a defendant is convicted of a Class A or B felony, then he or she is not entitled to a presumption in favor of alternative sentencing and "the state ha[s] no burden of justifying confinement through demonstrating the presence of any of the considerations upon which confinement may be based." *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, 2000 WL 1772518, at *2 (Tenn. Crim. App., at Knoxville, Dec. 4, 2000); *see State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (state must justify confinement by showing "evidence to the contrary" when defendant is a presumptive candidate for alternative sentencing). Thus, a defendant convicted of a Class A or B felony "has the burden . . . of presenting proof of his worthiness for consideration of alternative sentencing." *State v. Larry Lenord Frazier*, No. M2003-00808-CCA-R3-CD, 2004 WL 49112, at *4 (Tenn. Crim. App., at Nashville, Jan. 8, 2004).

Tennessee Code Annotated section 40-35-103 provides guidance as to whether the trial court should grant alternative sentencing or sentence the defendant to total confinement. Sentences involving confinement should be based upon the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .
>
> . . . .
>
> (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. . . .

Tenn. Code Ann. § 40-35-103(1), -(5). The trial court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 as they are relevant to the considerations set forth in section 40-35-103. *Id.* § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

A defendant is eligible for probation if the actual sentence imposed is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. *See* Tenn. Code Ann. § 40-35-303(a). A trial court shall automatically consider probation as a sentencing alternative for eligible defendants. *Id.* § 40-35-303(b). However, entitlement to probation is not

automatic and the defendant still bears the burden of proving suitability for full probation. *Id.*, Sentencing Commission Comments; *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Among the factors applicable to a probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978). Notably, the nature and circumstances of the offense may on occasion be so egregious as to preclude the grant of probation. *See State v. Poe*, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981).

After the sentencing hearing, the trial court concluded:

> [T]he sentence that's been agreed upon is an eight-year sentence. Pre[-]sentence investigation was ordered. The Court has read and considered that report, the information contained in it. That a criminal history was obtained which shows that he had several previous charges, but as far as the Court can ascertain, the convictions . . .
>
> Let's see, this final forfeiture and attachment issued in February 15th, 2003, for driving on a suspended license. Charges of simple possession, casual exchange were dismissed. Seat belt violation in July of 2004 was dismissed. He was convicted September 10th, 2004, for the offenses that occurred on July 2nd, 2004, a traffic offense and possession of marijuana in Knox County. That offense occurred while he was on bond for this offense.
>
> He has acknowledged the use of marijuana. Drug test showed positive for that. That drug test was conducted January the 11th, 2005, the date of the entry of his plea.
>
> The facts of the offense, of course, are very serious. Aggravated robbery is a serious offense. It's a Class B felony. It carries a sentencing range of between 8 and 12 years in the Department of Corrections. Weapons were involved. The facts, the Court recalls, the employees of the store were forced to a back room, forced at gunpoint to lie on the floor while the money was taken. A terrifying experience for them.
>
> Even though he doesn't acknowledge it, it would appear to the Court that he does have a significant problem with drugs. Whether he was under the influence at the time of this offense or not is unknown. But it is significant that he was found in possession of marijuana while on bond for this charge; that when he entered his plea that he had marijuana in his system at that time.
>
> In considering the issues, the Court must consider, under the law, alternative sentencing, split confinement, probation. He is a young man. He's 21 years of age. Has a child two-and-a-half, I believe I was told. He has the support of a -- of a loving and very responsible family. The Court's impressed with his family and the sincerity

> with which they care about this young man. They traveled all the way up here from Alabama to be with [him] here today and . . . [his] sister has testified in [his] behalf. And I appreciate that. But based upon the previous history of -- of criminal activity involving the use of drugs, convictions for possession of drugs after the release on bond in this case, the seriousness of the offense . . .
>
> I cannot . . . imagine . . . the fear placed upon people when suddenly forced at gunpoint to lie on the floor, robbed. Aggravated robbery is a serious offense. It's a Class B felony. Continued use of narcotics, even up till the time of his plea.
>
> So, based upon that criminal history, based upon the illegal use of drugs, and to avoid depreciating the seriousness of this offense, the Court must order this sentence served. . . .

To begin, from our view of the record, the trial court considered the sentencing principles and all relevant facts and circumstances; therefore, our review is de novo with a presumption of correctness. Following our review, we conclude the record supports the trial court's sentence of total confinement. First, the defendant's pre-sentence report reveals that despite his young age he has criminal convictions for simple possession, driving with a suspended license, and a traffic offense. Second, the defendant had marijuana in his system when he entered his guilty plea, and he committed a drug offense while out on bond from this charge. These actions by the defendant reflect poorly on his potential for rehabilitation. Third, contrary to the defendant's assertion, the trial court did take into account the defendant's age and familial support as mitigating factors, but concluded those factors did not outweigh the defendant's criminal history, consistent drug use, and the need to avoid depreciating the seriousness of the offense. Finally, because the defendant was convicted of a Class B felony, he was not entitled to the presumption in favor of alternative sentencing and it was his burden to establish his worthiness for alternative sentencing, a burden he did not carry. For these reasons, we affirm the judgment of the trial court.

CONCLUSION

Following our review of the record, the parties' briefs, and the applicable law, we affirm the judgment of the trial court ordering the defendant serve his sentence in confinement.

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J.C. McLIN, JUDGE